Filed 6/22/09 In re Gomez CA2/2

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION TWO

In re SOTERO GOMEZ, on Habeas Corpus.	B197980 (Los Angeles County Super. Ct. No. KA064573)

Original Proceeding. Bruce F. Marrs, Judge. Petition for writ of habeas corpus denied.

Vincent James Oliver for Petitioner Sotero Gomez.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Pamela C. Hamanaka, Assistant Attorney General, Lawrence M. Daniels, Kristofer Jorstad, Carl N. Henry, Deputy Attorneys General, for Respondent the People.

In *Apprendi v. New Jersey* (2000) 530 U.S. 466, 490 (*Apprendi*), the United States Supreme Court held that "[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." In *Blakely v. Washington* (2004) 542 U.S 296, 303 (*Blakely*), the high court stated that "the 'statutory maximum' for *Apprendi* purposes is the maximum sentence a judge may impose *solely on the basis of the facts reflected in the jury verdict or admitted by the defendant*."

In *Cunningham v. California* (2007) 549 U.S. 270 (*Cunningham*), the high court stated, "In accord with *Blakely*, . . . the middle term prescribed in California's statutes, not the upper term, is the relevant statutory maximum." (*Cunningham, supra,* at p. 288.) The court invalidated the California determinate sentencing law (DSL) as violating the Sixth Amendment to the extent it authorized the trial court to impose an upper term sentence based on facts that were found by the court, rather than by a jury beyond a reasonable doubt. (*Cunningham*, *supra*, at p. 293.)[1]

Petitioner Sotero Gomez filed a petition for writ of habeas corpus in this court, after the denial of his petition for writ of habeas corpus in the superior court. He claimed that *Cunningham* should be applied retroactively to his upper term sentence, which was imposed after *Blakely* was decided but before the decision in *Cunningham*. We issued an order to show cause. In an opinion filed August 7, 2007, we held that *Cunningham* was not to be applied retroactively to cases already final when it was decided.

The California Supreme Court granted review. It concluded that *Cunningham* applies retroactively to cases in which the judgment was not final at the time the decision in *Blakely* was issued. (*In re Gomez* (2009) 45 Cal.4th 650, 660 (*Gomez*).) The Supreme

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[1] Penal Code section 1170, subdivision (b) of the DSL has since been amended in response to the *Cunningham* decision to provide that the trial court has the discretion, in the interests of justice, to impose any of the three terms provided by statute. (Stats. 2007, ch. 3, § 2, signed into law as an urgency measure on Mar. 30, 2007.)

Court remanded the matter to this court for further proceedings consistent with its opinion.

We requested that the parties submit briefing on the issues of whether Gomez was denied his Sixth Amendment right to jury trial at sentencing, and, if so, whether such denial constituted harmless error. Having considered the parties' arguments, we deny the petition for writ of habeas corpus.

BACKGROUND

Gomez was convicted by jury of rape by force or fear (Pen. Code, § 261, subd. (a)(2)) and was sentenced to prison in July 2004, shortly after the issuance of the *Blakely* decision. At sentencing, the trial court overruled Gomez's *Blakely* objection and imposed the eight-year upper term. In imposing the upper term, the trial court stated, "[C]ircumstances in aggravation, this is a vicious, callous crime. The victim was a particularly vulnerable victim compared to other victims. She was living in the home, biological daughter. The defendant threatened the witnesses, tried to dissuade [the victim] a number of times. Certainly took advantage of a position of trust and confidence being the father. The manner and the commission of all the crimes testified to indicates that there was a common scheme or plan to use his daughters collectively for his own sexual appetites, all of which would clearly justify high term. . . . And the jury did, in fact, find that the age of the victim was under 18. . . . The court selects the high term for the five points I've just enumerated under rule [4.]421(a) and the jury's specific finding of age, which the court feels is sufficient to Blakelyize a high term." The court found in mitigation that Gomez had no significant prior record.

Gomez appealed, challenging his sentence as a violation of the Sixth Amendment and of *Blakely*. On September 8, 2005, in an unpublished opinion (*People v. Gomez*, No. B177065), we affirmed the judgment. Our opinion relied upon *People v. Black* (2005) 35 Cal.4th 1238 (*Black I*), where the California Supreme Court held that "the judicial factfinding that occurs when a judge exercises discretion to impose an upper term

sentence or consecutive terms under California law does not implicate a defendant's Sixth Amendment right to a jury trial." (*Black I, supra*, at p. 1244.)[2]

On January 22, 2007, in *Cunningham*, the United States Supreme Court rejected the California Supreme Court's conclusion in *Black I*. After *Cunningham* was decided, Gomez filed a habeas corpus petition in the superior court, citing *Blakely* and *Cunningham* and stating that the trial court had sentenced him to the upper term without a finding of aggravating factors by the jury beyond a reasonable doubt. The superior court denied the petition on March 29, 2007, ruling that Gomez's case had become final over a year before *Cunningham* was decided and that *Cunningham* should not be given retroactive application.

DISCUSSION

The California Supreme Court determined that *Cunningham* applies retroactively to those cases in which the judgment was not final at the time the decision in *Blakely* was issued. (*Gomez, supra*, 45 Cal.4th at p. 660.) Since Gomez's conviction was not final when the *Blakely* decision was issued, *Cunningham* is applicable to this case.

Respondent acknowledges that none of the factors in aggravation found by the trial court at sentencing was admitted by Gomez, nor did any involve a recidivist factor that is properly determined by a judge. Moreover, none of the factors was found by the jury beyond a reasonable doubt. The sentence imposed by the trial court thus violated Gomez's Sixth Amendment right to a jury trial. (See *People v. Towne* (2008) 44 Cal.4th 63, 75-83; *People v. Black* (2007) 41 Cal.4th 799, 818-820 (*Black II*).)

In *People v. Sandoval* (2007) 41 Cal.4th 825 (*Sandoval*), our Supreme Court held that the denial of the right to a jury trial on aggravating circumstances is reviewed under the *Chapman* (*Chapman v. California* (1967) 386 U.S. 18, 24) standard. The court explained that, in applying *Chapman*, "[a reviewing court] must determine whether, if the

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[2] We take judicial notice of our opinion in *People v. Gomez*, B177065, and of the record on appeal in this matter.

question of the existence of an aggravating circumstance or circumstances had been submitted to the jury, the jury's verdict would have authorized the upper term sentence." (*Sandoval*, *supra*, at p. 838.) "Under California's determinate sentencing system, the existence of a single aggravating circumstance is legally sufficient to make the defendant eligible for the upper term." (*Black II*, *supra*, 41 Cal.4th at p. 813.) Hence, we may find Sixth Amendment error harmless if we conclude, "beyond a reasonable doubt, that the jury, applying the beyond-a-reasonable-doubt standard, unquestionably would have found true at least a single aggravating circumstance had it been submitted to the jury." (*Sandoval*, *supra*, at p. 839.)

We conclude that the Sixth Amendment error in this case was harmless.

Among the factors in aggravation found by the trial court was that "the victim was a particularly vulnerable victim compared to other victims. She was living in the home, biological daughter." In *Sandoval*, too, the trial court relied on victim vulnerability as a factor in aggravation, and the Supreme Court considered whether this factor would have been found true by the jury beyond a reasonable doubt.

The *Sandoval* court stated, "In imposing the upper term sentence, the trial court also concluded the victims were particularly vulnerable in that they were unarmed and taken by surprise. The record, however, does not reflect such a clear-cut instance of victim vulnerability that we confidently can conclude the jury would have made the same findings, as might be the case if, for example, the victims had been elderly, very young, or disabled, or otherwise obviously and indisputably vulnerable. The evidence was contested as to whether defendant–who had been injured two days earlier at the bar–planned to take the victims by surprise, or instead had brought Negrete and Del Rio along for the purpose of self-defense and herself was surprised when they initiated an attack. In addition, both defendant and [codefendant] Romero told the officers, during their interviews, that they believed some of the patrons at the bar were armed, and Romero testified to that effect at trial. Accordingly, the evidence that the victims were

particularly vulnerable cannot be characterized as overwhelming or uncontested." (*Sandoval*, *supra*, 41 Cal.4th at p. 842.)

Here, the factors underlying the trial court's finding that the victim was particularly vulnerable–that she was Gomez's biological daughter and lived in his home–were neither vague nor subjective, and they were undisputed at trial. Although these factors were not charged, it is inconceivable that the evidence would have been any different had they been charged. This is a "clear-cut instance of victim vulnerability" where the victim was "obviously and indisputably vulnerable." (*Sandoval*, *supra*, 41 Cal.4th at p. 842.) We are satisfied beyond a reasonable doubt that, had these factors been placed before the jury, the jury would have found true beyond a reasonable doubt that the victim was particularly vulnerable. (*People v. Wilson* (2008) 44 Cal.4th 758, 812-813; see *People v. Landaverde* (2007) 157 Cal.App.4th 28, 34.) The same is true for the circumstance that Gomez, the victim's father, took advantage of a position of trust and confidence. (See *People v. Landaverde*, *supra*, at p. 34.) The trial court further determined that the jury had found that Gomez raped the victim when she was under 18 years of age. To the extent the age of the victim also supported the trial court's finding of vulnerability, the jury found this fact by clear and convincing evidence and, absent any evidence to the contrary, it would certainly have found this fact true beyond a reasonable doubt as well. Under *Sandoval*, we conclude that the error was harmless beyond a reasonable doubt.

DISPOSITION

The petition for writ of habeas corpus is denied.

_____, P. J.

BOREN

We concur:

_____, J.

DOI TODD

_____, J.

CHAVEZ, J.